

ENCOURAGING TRANSPORTATION-ORIENTED
DEVELOPMENT IN THE UNITED STATES: A CASE FOR
UTILIZING “EARNED-AS-OF-LOCATION” CREDITS TO
PROMOTE STRATEGIC ECONOMIC DEVELOPMENT

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INTRODUCTION

Midtown East, a roughly seventy-three block neighborhood surrounding Grand Central Terminal in Manhattan, traditionally served as one of the most important business districts in the New York City region.¹ With the average office building in the neighborhood reaching nearly seventy years old, however, and with little Class A office space constructed in the past two decades, the Midtown East office building stock increasingly fails to meet the needs of modern corporate tenants.² To ensure that the area would continue to serve as a premier business district, the Bloomberg Administration proposed an ambitious rezoning of Midtown East in 2012 that would allow for the construction of larger office buildings in order to take advantage of the area's transportation infrastructure.³

The plan was met with severe resistance from residents and community leaders concerned about overcrowding, and Mayor Bloomberg decided to withdraw the proposal after the New York City Council indicated that it would vote to reject the rezoning initiative.⁴ In 2014, a Midtown East steering committee began to meet in another effort to rezone the neighborhood.⁵ The new proposal seeks, among other things, to compel developers to make improvements to the area's transportation infrastructure as a requirement for constructing larger buildings.⁶ This element contained in the new

1. See Dep't of City Planning, *East Midtown Rezoning: Overview*, CITY OF N.Y., http://www.nyc.gov/html/dcp/html/east_midtown/index.shtml [<https://perma.cc/6XDD-ZJWK>] (last visited Mar. 30, 2016) (providing an overview of the Midtown East business district and the proposed zoning plan).

2. See *id.*

3. Charles V. Bagli, *Bloomberg Pushes a Plan to Let Midtown Soar*, N.Y. TIMES (Oct. 6, 2012), http://www.nytimes.com/2012/10/07/nyregion/mayor-bloomberg-pushes-a-plan-to-let-midtown-soar.html?_r=0 [<https://perma.cc/Y4UP-MZ9Y>].

4. Charles V. Bagli, *End of Proposal to Raise Skyline on the East Side*, N.Y. TIMES (Nov. 12, 2013), <http://www.nytimes.com/2013/11/13/nyregion/support-evaporates-for-bloombergs-plan-to-rezone-east-side.html> [<https://perma.cc/C3GW-V8HB>].

5. Keiko Morris & Josh Barbanel, *Rezoning of Midtown East Advances*, WALL ST. J. (June 14, 2015, 9:36 PM), <http://www.wsj.com/articles/rezoning-of-midtown-east-advances-1434331014> [<https://perma.cc/HR4G-3ZST>].

6. See *id.*

zoning proposal is an illustration of what is known as “Transportation-Oriented Development.”⁷

Transportation-Oriented Development (TOD) is a city- and municipal-planning strategy that focuses on increasing residential and commercial development around transportation centers in an effort to encourage and facilitate public transportation use and decrease automobile dependence.⁸ TOD is lauded for its numerous economic, social, and health benefits, which include decreasing pollution and traffic congestion, increasing property values, and fostering safer neighborhoods.⁹

Growth patterns in the United States, however, have typically focused on low-density, auto-centric sprawl.¹⁰ Municipal zoning today largely favors reducing residential and commercial densities, meaning institutional interests are incentivized to exclude compact development, the public’s perception regarding the scope and benefits of TOD is often misinformed, and the lack of cooperation between municipalities hinders efficient regional transportation development strategies.¹¹

In an effort to promote TOD when faced with such obstacles, including the hurdles presented by the Midtown East rezoning, this Note will argue for the creation of legislatively appointed zoning regulatory agencies that have the authority to grant a property with “earned-as-of-location” (EAOL) credits, which would permit a developer to construct a building in excess of height or floor-area ratio limitations under current zoning regulations if that building is near a transit center.¹² EAOL credits would serve as a less formal method of zoning variance that would allow developers to exceed current zoning limitations without having to resort to traditional means of recourse, such as rezoning or seeking a formal zoning variance.

7. See *infra* Part I.A.

8. See *infra* Part I.A.

9. See *infra* Part I.B.

10. See *infra* notes 80-83 and accompanying text (discussing the proliferation of low-density development in the United States).

11. See *infra* Part II.B.

12. EAOL credits and the legislatively appointed zoning agencies are original proposals developed in this Note, and the author is not aware of any analogous regulations that currently exist.

Past research and zoning initiatives aimed at increasing TOD have been wide and varied.¹³ Many cities have enacted TOD reforms by decreasing zoning restrictions within a certain proximity to transit centers through a process known as “blanket zoning.”¹⁴ This practice is common along transportation corridors like the Rosslyn-Ballston corridor in Arlington County, Virginia.¹⁵ EAOL credits differ from these traditional TOD methods because, unlike blanket zoning around transportation centers, EAOL credits are not designed to provide for large swaths of land with decreased zoning restrictions. Rather, EAOL credits would be applied on a case-by-case basis when the property in question is so inextricably linked to transit infrastructure that its location warrants the construction of larger commercial or residential structures.

The goal of EAOL credits is to advance TOD by promoting economic development in strategic transportation corridors to maintain the integrity, and maximize the investment, of urban transit infrastructure. EAOL credits reflect the philosophy that the benefits provided by transportation infrastructure, and the public policy desire to encourage mass transportation use, are often so substantial that they warrant divergence from zoning that would restrict the full realization of social, economic, and health rewards.¹⁶ EAOL credits are designed to provide developers the opportunity to cultivate lots in proximity to transit centers, based on market demand, in the absence of an otherwise compelling reason that would necessitate rezoning or the issuance of a variance.

Upon application by developers who wish to construct buildings that exceed current zoning limitations, the zoning regulatory agencies would determine, on a case-by-case basis, whether to grant the developer EAOL credits using a three-part test. First, the development site would have to be within close proximity to a transit center.¹⁷ Second, the development would have to include proposals for public improvements.¹⁸ Third, the developer would

13. See *infra* Part II.B (discussing TOD initiatives in different areas of the United States).

14. See *infra* notes 116-24 and accompanying text (discussing TOD in the Washington, D.C. metropolitan area).

15. See *infra* note 122-24 and accompanying text.

16. See *infra* Part I.B.

17. See *infra* Part III.D.1.

18. See *infra* Part III.D.2.

need to show a likely reasonable rate of return from the proposed development.¹⁹

An aggrieved party could seek judicial review of the zoning agency's decision. The courts should, however, give deference to the decision of the zoning agencies unless there was a showing of egregious error, bad faith, or some other exigent circumstances. If the zoning agency did not confer EAOL credits on the development site, the developer would be left to resort to traditional variance request processes.

This Note will analyze EAOL credits as a form of TOD. Part I of this Note will introduce TOD, explore the benefits of TOD, and explain how EAOL credits would help maximize the realization of these benefits. Part II will examine how current zoning practices in the United States present obstacles to TOD goals and implementation. Part III will introduce EAOL credits, explain how EAOL credits should be applied, and elaborate on the elements used to determine whether a property would be eligible for EAOL credits. Finally, Part IV will explore factors that threaten the future expansion of TOD and how EAOL credits would help to alleviate those difficulties.

I. INTRODUCTION TO TRANSPORTATION-ORIENTED DEVELOPMENT (TOD) AND ITS BENEFITS

A. *What Is TOD, and How Do "Earned-as-of-Location" (EAOL) Credits Advance It?*

TOD is often understood as a regional planning strategy that orients mixed-use commercial and residential development around or near public transportation facilities.²⁰ Though no definition captures a universally accepted notion of what TOD is,²¹ most interpretations

19. See *infra* Part III.D.3.

20. See TRANSIT COOP. RESEARCH PROGRAM, TRANSIT-ORIENTED DEVELOPMENT AND JOINT DEVELOPMENT IN THE UNITED STATES: A LITERATURE REVIEW 5 (2002), http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_rrd_52.pdf [<https://perma.cc/PX6D-5JGJ>].

21. See DENA BELZER & GERALD AUTLER, THE BROOKINGS INST. CTR. ON URBAN & METRO. POLICY & THE GREAT AM. STATION FOUND., TRANSIT ORIENTED DEVELOPMENT: MOVING FROM RHETORIC TO REALITY 3 (2002), <http://www.brookings.edu/es/urban/publications/belzertod.pdf> [<https://perma.cc/MPP6-HV99>].

of the term share common traits regarding prioritizing land use to encourage and facilitate mass transit ridership.²² Often, TOD requires cities to relax zoning regulations to permit construction of high-density buildings in proximity to transit stations.²³ The goal of TOD is to provide communities with alternative means of transportation in an effort to reduce automobile dependency and thus lessen air pollution and traffic congestion.²⁴

EAOL credits are tools that could be used to advance TOD and encourage greater investment in and utilization of transportation infrastructure. By authorizing the construction of larger buildings than otherwise allowed, even within existing transportation zoning overlays, EAOL credits would enhance TOD by increasing development that is oriented toward mass transit. EAOL credits would increase the number of businesses, homes, customers, and residents that have access to, and could utilize, transportation alternatives to automobiles. Driven in large part by the economic resurgence of cities and strong growth among younger cohorts, growth in United States cities has outpaced suburban and rural growth for the first time since the 1920s.²⁵ EAOL credits would help cities and other communities maximize the potential of harnessing the population and economic growth that favors transportation-based commercial and residential developments. Using EAOL credits as a method to advance TOD would help increase the numerous health, social, and economic benefits derived from effective TOD implementation.

22. See TRANSIT COOP. RESEARCH PROGRAM, *supra* note 20, at 5-6 (discussing the common elements of a TOD definition).

23. See TERRY PARKER ET AL., CAL. DEP'T OF TRANSP., STATEWIDE TRANSIT-ORIENTED DEVELOPMENT STUDY: FACTORS FOR SUCCESS IN CALIFORNIA 7, 11 (2002), <http://www.dot.ca.gov/hq/MassTrans/Docs-Pdfs/TOD-Study-Final-Rpt.pdf> [<https://perma.cc/YJ8R-RRRK>].

24. See *id.* at 11.

25. See *Millennials Prefer Cities to Suburbs, Subways to Driveways*, NIELSEN (Mar. 4, 2014), <http://www.nielsen.com/content/corporate/us/en/insights/news/2014/millennials-prefer-cities-to-suburbs-subways-to-driveways.html> [<https://perma.cc/C8DV-ZZ7B>] (discussing how younger generations are driving the population growth of cities).

B. Benefits of TOD

1. Health Benefits

TOD provides a multitude of health-related benefits.²⁶ The direct benefits stem from the opportunity for individuals to increase mobility and live active lifestyles.²⁷ The rise of auto-centric development correlates with “dramatic increase[s] in the number of overweight adults and children.”²⁸ There are worrisome risks associated with living in sedentary communities.²⁹ A California study found that “excessive inactivity and the obesity that results from it[] may be a primary contributing factor in the 200,000 annual deaths that are caused by heart disease, cancer, and diabetes.”³⁰

TOD and EAOL credits combat the sedentary lifestyle encouraged by automobile dependence by promoting mobility through viable, transit-oriented communities.³¹ The U.S. Centers for Disease Control advises adults to exercise for at least 150 minutes a week, totaling approximately twenty-two minutes per day.³² Yet, “North Americans only walk an average of six daily minutes overall.”³³ Commuters who utilize public transportation, however, spend about nineteen minutes walking each day, which comes close to fulfilling the Centers for Disease Control’s exercise recommendations.³⁴

26. See PARKER ET AL., *supra* note 23, at 24-25 (discussing the health benefits of TOD).

27. *Id.* at 25. Decades of sprawling development increased Americans’ dependence on the automobile as populations shifted away from cities, consequently promoting a sedentary lifestyle. *Id.*

28. *Id.*

29. *See id.*

30. *Id.* Another study by the Victoria Transport Policy Institute found that “[i]nadequate physical activity, and resulting excessive body weight, contribute to heart and vascular diseases, strokes, diabetes, hypertensive diseases, osteoporosis, joint and back problems, colon and breast cancers, and depression.” TODD LITMAN, VICTORIA TRANSP. POLICY INST., EVALUATING PUBLIC TRANSPORTATION HEALTH BENEFITS 11 (2010), http://www.apta.com/resources/reportsandpublications/Documents/APTA_Health_Benefits_Litman.pdf [<https://perma.cc/PQG2-CXSX>].

31. *See* PARKER ET AL., *supra* note 23, at 25 (discussing how TOD promotes healthier lifestyles).

32. LITMAN, *supra* note 30, at 11. Currently, less than half of all Americans achieve the recommended physical activity targets. *Id.* at 12.

33. *Id.*

34. *Id.* The Victoria Transport Policy Institute cited a study concluding that train commuters walk 30 percent more per day than car commuters and that public transit commuters

Studies have also indicated that rates of obesity generally decrease as access to public transportation among the general population increases.³⁵ For example, “New York residents’ Body Mass Index (BMI) ratings tend to decline significantly with greater subway and bus stop density.”³⁶ Residents in transportation-centered communities “tend to walk more and have lower rates of obesity and hypertension than in sprawled areas.”³⁷ Additionally, the prevalence of long-lasting diseases, like asthma and diabetes, increases as individuals live further from transit centers.³⁸ By implementing EAOL credits, communities can increase the number of people who meet the suggested activity level and thus reap the associated health benefits.

TOD also increases health by reducing air pollution.³⁹ Transportation produces 28 percent of all greenhouse gas emissions in the United States.⁴⁰ That pollution is responsible for an estimated 53,000 early deaths each year.⁴¹ However, living in an efficient neighborhood with access to transportation drastically reduces a household’s vehicle-related carbon emission footprint.⁴² Individuals who live within a half mile of a transportation station have 43 percent lower transportation-related greenhouse gas emissions than those living further away from public transportation.⁴³ By utilizing EAOL credits, developers can aggregate larger building densities around transportation centers to reduce carbon footprints and

were more likely to reach daily recommended physical activity levels than car commuters. *Id.*

35. *See id.* at 13 (discussing the relationship between use of alternative modes of transportation and BMI).

36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.* at 10.

40. *See* PETER HAAS ET AL., CTR. FOR TRANSIT-ORIENTED DEV., TRANSIT ORIENTED DEVELOPMENT AND THE POTENTIAL FOR VMT-RELATED GREENHOUSE GAS EMISSIONS GROWTH REDUCTION 2 (2010), <http://ctod.org/pdfs/2010TODPotentialGHGEmissionsGrowth.pdf> [<https://perma.cc/XBZ9-H993>].

41. Jennifer Chu, *Study: Air Pollution Causes 200,000 Early Deaths Each Year in the U.S.*, MASS. INST. OF TECH. (Aug. 29, 2013), <http://news.mit.edu/2013/study-air-pollution-causes-200000-early-deaths-each-year-in-the-us-0829> [<https://perma.cc/83WX-B9GM>].

42. *See* HAAS ET AL., *supra* note 40, at 33.

43. *See id.* at 11. Further, greenhouse gas emissions can be reduced by 36 percent in regions that engage in more “compact and efficient” development patterns. *See id.* at 11-12.

hazardous automobile emissions that pose a threat to human health.

Finally, TOD provides safety benefits in relation to traffic fatalities.⁴⁴ Automobile accidents kill over 40,000 individuals in the United States annually.⁴⁵ In contrast, “[p]ublic transit is a relatively safe mode, with only about one-twentieth the passenger fatality rate of automobile travel.”⁴⁶ People who live in TOD communities “tend to drive fewer annual miles, drive at lower speeds, and have better travel options that allow them to avoid high risk driving, such as after drinking alcohol or when ill.”⁴⁷ Using EAOL credits to promote greater development in direct proximity to transportation centers will increase the overall health and safety of commuters and the general public.

2. *Economic Benefits*

Public transportation is “often a powerful force for facilitating both density and economic agglomeration.”⁴⁸ Firms tend to aggregate around, and value proximity to, transportation centers because they concentrate pedestrian access.⁴⁹ Employers benefit from the concentration of economic activity because they are able to utilize the transportation infrastructure to recruit a greater number of talented employees: “By accessing a larger, higher quality labor pool, employers may be able to attract and retain higher quality workers.”⁵⁰

Whereas economic growth in auto-centric communities may be limited by road capacity and traffic congestion, “transit access provides additional transportation capacity without necessitating the provision of additional parking infrastructure, [or] expanded road-

44. See LITMAN, *supra* note 30, at 7.

45. See *id.* at 5. “The United States has the highest per capita traffic fatality rates among peer countries.” *Id.* at 6.

46. *Id.* at 7.

47. *Id.*

48. DENA BELZER ET AL., CTR. FOR TRANSIT-ORIENTED DEV., TRANSIT AND REGIONAL ECONOMIC DEVELOPMENT 9 (2011), <http://ctod.org/pdfs/2011TransitandRegionalED.pdf> [<https://perma.cc/QCX2-FJB5>].

49. See *id.*

50. *Id.* (“This population, which includes a large number of young workers in knowledge-based sectors, prefers to live in more pedestrian- and bicycle-friendly urban areas.”).

way capacity.”⁵¹ By concentrating employment near transportation centers using EAOL credits, employers benefit from a diversified market, enhanced labor pools, increased mobility for employees, and greater transportation reliability.⁵²

These economic desirability factors translate into increased real estate values in proximity to transportation centers. In Washington, D.C., commercial and retail space located less than one-twentieth of a mile from a metro station possessed a 30 percent rental premium per square foot over properties located more than a quarter mile away.⁵³

The level of mobility and walkability within TOD areas is often measured through the Irvine Minnesota-Inventory Scale (IMI).⁵⁴ The IMI Scale rates walkability on a scale from one to five.⁵⁵ For every increase in the level of walkability on the IMI Scale, in the Washington, D.C., metropolitan area, office rent premiums increase by an average of \$8.88 per square foot; retail rent premiums increase by \$6.92 per square foot; and retail sales volume increase 80 percent.⁵⁶ EAOL credits would help developers capitalize on the business demand in proximity to transit centers, while simultaneously facilitating larger economic development in strategic areas.

51. *Id.* at 10 (explaining how TOD reduces the need for road infrastructure and parking spaces).

52. *See id.* at 11 fig.1.

53. *See* Jonathan O’Connell, *Every Foot Matters When It Comes to Real Estate near Metro, Researchers Say*, WASH. POST (Dec. 10, 2013), https://www.washingtonpost.com/business/capitalbusiness/every-foot-matters-when-it-comes-to-real-estate-near-metro-researchers-say/2013/12/10/7e042f6a-6120-11e3-bf45-61f69f54fc5f_story.html [<https://perma.cc/7JFC-7QM2>]. Within one year of opening, property values around the Rosslyn-Ballston Metro rose by over \$1 billion. *See Transit-Oriented Development Helps Economic Growth*, SUSTAINABLE COMMUNITIES, <http://www.p4sc.org/articles/all/transit-oriented-development-helps-economic-growth> [<https://perma.cc/QYT7-MSVX>] (last visited Mar. 30, 2016).

54. *See, e.g.*, CHRISTOPHER B. LEINBERGER & MARIELA ALFONZO, METRO. POLICY PROGRAM AT BROOKINGS, WALK THIS WAY: THE ECONOMIC PROMISE OF WALKABLE PLACES IN METROPOLITAN WASHINGTON, D.C. 6 (2012), <http://www.delmar.ca.us/DocumentCenter/View/631> [<https://perma.cc/T5YA-DYMHJ>].

55. *See id.* at 6-7. Level one is the lowest grade of possible walkability and level five is the highest grade of walkability. *See id.*

56. *See id.* at 9. Every increase in level on the IMI Scale also produces a \$31.76 per square foot premium per month on residential rents and an \$81.54 per square foot premium on residential housing values. *See id.*

Evolving corporate strategies continue to place emphasis on developments in close proximity to transportation facilities.⁵⁷ It is clear that many employers view mass transit proximity as important when determining office locations.⁵⁸ Economic developments adjacent to transit centers “will likely out perform outlying areas and receive more private sector financial investments than non-transit accessible developments.”⁵⁹

Aggregating economic interests in relation to transportation centers also produces benefits in relation to commute patterns. In 2011, urban Americans incurred approximately \$121 billion in costs related to traffic congestion.⁶⁰ Congestion forced Americans to travel an additional 5.5 billion hours and purchase an additional 2.9 billion gallons of fuel.⁶¹ The cost of congestion to American commuters is predicted to grow from \$121 billion in 2011 to nearly \$199 billion in 2020.⁶²

TOD and EAOL credits offer an advantage to businesses and commuters in that they provide reduced commute times by decreasing traffic congestion.⁶³ Residents living in communities with access to public transportation traveled only about half as many vehicle miles as those in communities without transportation access.⁶⁴ EAOL credits would provide increased economic opportunities for busi-

57. *See generally id.*

58. *See, e.g.,* ADIE TOMER, METRO. POLICY PROGRAM AT BROOKINGS, WHERE THE JOBS ARE: EMPLOYER ACCESS TO LABOR BY TRANSIT 1 (“Over three-quarters of all jobs in the 100 largest metropolitan areas are in neighborhoods with transit service.”).

59. *See generally Why Build Near Transit?*, LOC. GOV'T COMMISSION, <http://www.lgc.org/why-build-near-transit> [<https://perma.cc/MT7T-Q6QL>] (last visited Mar. 30, 2016).

60. *See* DAVID SCHRANK ET AL., TEX. A&M TRANSP. INST., TTI'S 2012 URBAN MOBILITY REPORT 1 (2012), <http://s3.documentcloud.org/documents/566377/2012-urban-mobility-report.pdf> [<https://perma.cc/2KC2-NJ3L>].

61. *Id.* Further, the congestion cost per commuter has increased drastically over the past three decades. In 1982, the average congestion cost per commuter was \$342. *Id.* at 5. By 2011, this figure increased to \$818 per commuter, accounting for inflation. *Id.* In 2011, the average commuter spent an additional thirty-eight hours per year traveling due to congestion, an increase from sixteen additional hours per year in 1982. *Id.*

62. *Id.* at 11.

63. *See* ROBERT CERVERO ET AL., TRANSIT COOP. RESEARCH PROGRAM, TRANSIT-ORIENTED DEVELOPMENT IN THE UNITED STATES: EXPERIENCES, CHALLENGES, AND PROSPECTS 125-26 (2004), http://onlinepubs.trb.org/onlinepubs/terp/terp_rpt_102.pdf [<https://perma.cc/TVE7-64C7>] (discussing how TOD reduces commute times).

64. *See id.* at 126. TOD has the opportunity to “lower annual rates of driving by 20 to 40 percent for those living, working, and/or shopping near major transit stations.” *Id.*

nesses in strategic areas that would reduce commute times and provide more reliable methods of transportation for commuters.

3. *Social Benefits*

The increased density surrounding transportation centers creates busy public places with prolonged periods of pedestrian activity throughout the day and evening.⁶⁵ This activity produces “eyes on the street,” which increases community safety by decreasing criminal activity.⁶⁶ Compact, pedestrian-friendly environments aligned around transportation centers create socially “defensible spaces” through a form of neighborhood policing.⁶⁷

TOD also “consume[s] less land than conventional, low-density dispersed development, [and] reduces pressure to convert prime farmland and other resource lands to urban uses.”⁶⁸ Population growth and low-density developments “threaten to reduce agricultural production by eliminating some of the most productive farmland in the world.”⁶⁹ TOD reduces the rate of loss to “fragile and natural habitat lands.”⁷⁰ Whereas low-density development continually degrades environmental resources by expanding urban fringes, TOD and EAOL credits work to concentrate development and preserve desirable, natural, and recreation landscapes.⁷¹

Finally, TOD provides citizens with the added benefit of an enhanced “[s]ense of [c]ommunity.”⁷² Current research suggests that residents in low-density, suburban neighborhoods no longer feel a sense of community.⁷³ TOD emphasizes public spaces that encour-

65. *Id.* at 128.

66. *See id.*

67. *See id.* (“[Busy urban spaces with increased street presence] instill a sense of safety and well-being, particularly for families with kids, through a tacit form of neighborhood policing. A review of transit stations in Tucson, Corpus Christi, and New York City found that street life in combination with lighting improvements, addition of retail kiosks, street art, and a police presence were associated with declines in both perceived and actual crime rates.”).

68. PARKER ET AL., *supra* note 23, at 43.

69. *Id.* Rapid population growth, combined with increased low-density developments, threatens to eliminate some of the most productive farmland in the world. *See id.* at 44.

70. *Id.* at 45.

71. *See id.*

72. *Id.* at 26.

73. *See id.*

age social interaction within the community.⁷⁴ Whereas low-density development fosters private living, which creates social fragmentation, TOD increases social diversity and promotes stronger ties with the community.⁷⁵ By implementing EAOL credits, communities could concentrate larger developments around strategic transportation facilities that would reduce habitat destruction and provide dynamic, healthy social environments.

II. IMPEDIMENTS OF CURRENT ZONING REGULATIONS TO TOD IN THE UNITED STATES

A. Analyzing the Built Environment

Many “[d]ecisions about how and where we build our communities have significant impacts on the natural environment and on human health.”⁷⁶ The development patterns of American cities greatly changed over the course of the twentieth century.⁷⁷ In the early twentieth century, most urban areas had a dense, central core that was anchored by ports, terminals, or other employment centers.⁷⁸ Suburban growth followed transportation infrastructure such as railroad lines and streetcars.⁷⁹

Development patterns began to change after World War II with the expansion of the automobile industry.⁸⁰ Economic growth, coupled with federal interstate highway construction and housing policies that favored home ownership, diffused development away

74. *See id.*

75. *Id.* “Across the country, residents and workers are increasingly seeking to live and work in places that offer a range of activities for more hours of the day, a trend that has not gone unnoticed in real estate development circles.” *Id.* at 27. Younger people continue to move to, and value, dynamic environments centered on transportation options. *See id.*

76. MELISSA G. KRAMER, U.S. ENVTL. PROT. AGENCY, OUR BUILT AND NATURAL ENVIRONMENTS: A TECHNICAL REVIEW OF THE INTERACTIONS BETWEEN LAND USE, TRANSPORTATION, AND ENVIRONMENTAL QUALITY, at i (2d ed. 2013), <http://www2.epa.gov/sites/production/files/2014-03/documents/our-built-and-natural-environments.pdf> [<https://perma.cc/B9LM-CP3D>]. Patterns of land use, building density, and transportation not only affect the natural ecosystems, but they also have direct health, economic, and social implications. *See id.* at i-ii.

77. *See id.* at 5 (discussing the change in layout of American cities).

78. *Id.*

79. *Id.*

80. *See id.*

from dense, urban cores toward low-density sprawl patterns.⁸¹ Substantial population growth prompted further expansion of low-density development and entrenched new generations of Americans in auto-dependent suburbs.⁸² Meanwhile, “[t]he population of the United States grew from 76,212,168 in 1900 to 311,591,917 in 2011,” and the population living in the suburbs “grew from 23 percent in 1950 to 47 percent in 2010.”⁸³

The change in development patterns towards the suburbs led to a dramatic increase in the physical boundaries of metropolitan areas over the past several decades.⁸⁴ The size of “urbanized area[s] increased 2.5 times faster than population growth between 1950 and 2010.”⁸⁵ In 1982, 71 million acres of land were developed in the United States; by 2007, that “rose to more than 111 million [acres], a 57 percent increase.”⁸⁶ The population of the United States, however, grew by just 30 percent over this same time period.⁸⁷ Such growth reduces the viability of mass transportation infrastructure by decentralizing economic centers and residential populations.⁸⁸

Whereas “the population [of the United States] roughly doubled between 1950 and 2011, ... vehicle travel during the same period increased nearly sixfold, from around 458 billion vehicle miles traveled (VMT) to nearly 3 trillion VMT.”⁸⁹ Since 1950, however, few Americans have commuted via public transportation.⁹⁰ The result is exacerbated traffic congestion that many commuters can do little to avoid given the limited transportation methods and routes in low-density areas.⁹¹ In addition, the increase in low-density, auto-centric sprawl intensifies ills like pollution, greenhouse gas emissions,

81. *See id.*

82. *See id.* at 7.

83. *Id.* at 6-7.

84. *Id.*

85. *Id.*

86. *Id.* at 10.

87. *Id.*

88. *Id.* at 7.

89. *Id.* at 26.

90. *See id.* at 29. Over the past thirty years, public transportation commuting has steadily declined in most areas of the country. *See id.*

91. *See id.* at 31.

traffic crashes, excess fuel consumption, poor physical fitness, loss of natural land, and stunted community life.⁹²

The problem is forecasted to increase as “[t]he population of the United States is projected to grow 42 percent between 2010 and 2050, from 310 million to 429 million.”⁹³ These people will need additional places to live and work, and will require further infrastructure investments to support such growth. By 2050, the United States will need an additional 52 million housing units and a 60 percent increase in existing nonresidential space to accommodate growth projections.⁹⁴

These figures present an opportunity to reshape urban growth away from low-density patterns dependent upon automobile travel. As this Note will now examine, however, zoning policies in the United States tend to present substantial hurdles to TOD.

B. The Obstacles Current Zoning Policies Pose to TOD

Rather than promoting increased development density in strategic areas, municipal zoning tends to decrease building densities in the United States, encouraging auto-centric growth.⁹⁵ State model statutes, promulgated by the U.S. Department of Commerce in the 1920s, originally influenced enabling laws.⁹⁶ Among the purposes of zoning was “to prevent the overcrowding of land; [and] to avoid undue concentration of population.”⁹⁷ In 1926, the Supreme Court upheld the constitutionality of local municipal zoning as a valid exercise of the states’ police power.⁹⁸ *Village of Euclid v. Ambler Realty Co.* implicitly held that limiting the spread of dense, multi-

92. JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE 1 (2006) (discussing the negative effects of low-density zoning).

93. KRAMER, *supra* note 76, at 31.

94. *Id.*

95. See LEVINE, *supra* note 92, at 50-51 (discussing how municipal zoning in the United States favors low-density zoning).

96. Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 109 (2002).

97. U.S. DEP’T OF COMMERCE, ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT § 3 (1926) [hereinafter STANDARD ZONING ACT], <https://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf> [<https://perma.cc/D8JP-6R3T>].

98. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926).

family housing is a legitimate goal of public action under Euclidean Zoning.⁹⁹ The Court held that:

[D]evelopment of detached house sections is greatly retarded by the coming of apartment houses, which has ... resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk ... until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.¹⁰⁰

Very few shares of “developable land in U.S. metropolitan areas are zoned for multifamily housing, suggesting regulatory limitations on its growth.”¹⁰¹ Municipalities have used their regulatory powers to prevent dense development near desirable transportation centers.¹⁰² As a result, development tends to be low in density and shifts further away from urban cores.¹⁰³

Jurisdictions are motivated to exclude compact, dense developments.¹⁰⁴ William Bogart has identified several motivations that encourage municipalities to exclude high-density developments. First, municipalities have a fiscal incentive to block those who pay less in local taxes than what they receive in municipal services.¹⁰⁵ Municipalities have a public goods incentive to limit density if it would cause an increase in the cost of producing local services.¹⁰⁶ Further, municipalities have a motivation to limit density because it will increase the consumption of resources, taking away net goods

99. See LEVINE, *supra* note 92, at 51.

100. *Euclid*, 272 U.S. at 394.

101. LEVINE, *supra* note 92, at 51.

102. See *id.* When density is zoned out of one location, it does not necessarily translate into similarly dense forms of development in other locations. See *id.*

103. See *id.* (explaining how prohibition against TOD leads to low-density, sprawling development).

104. William T. Bogart, ‘What Big Teeth You Have!’: Identifying the Motivations for Exclusionary Zoning, 30 URB. STUD. 1669, 1670 (1993).

105. *Id.*

106. See *id.*

and services from existing residents.¹⁰⁷ As a result, regulatory environments are often unwelcoming, even in zones that may be equipped to handle TOD.¹⁰⁸

To combat innate interests against high-density development, a “smart growth” movement began to gain momentum in the 1990s to promote statutory reforms to state planning and zoning enabling acts.¹⁰⁹ The smart growth initiative “advocates [for] local flexibility and promotes mixed-use development, in contrast to Euclidean zoning which promotes a more rigid separation of uses.”¹¹⁰ To achieve the goal of increasing density around strategic transportation centers, the smart growth movement “urge[s] local governments to use a variety of traditional local land use controls.”¹¹¹

States and cities have varied in their approaches to advance certain smart growth initiatives. Boston, for example, encourages TOD through zoning and other regulations.¹¹² Boston’s strong market, density, and transit infrastructure facilitates development that is transit-oriented.¹¹³ State and city officials also “siphon[ed] funds from Massachusetts’s federal highway funds and use[d] them instead for transit improvements.”¹¹⁴ The city enforces “a cap on downtown parking; requires active ground-floor uses; [and] promotes pedestrian-friendly streetscapes.... The city also encourages a jobs/housing balance around transit stations.”¹¹⁵

The Washington, D.C. Metro transportation system also created TOD that development planners largely hail as a success.¹¹⁶ One of the most effective areas of TOD implementation in the D.C. metropolitan area comes from the Rosslyn-Ballston corridor in Arlington

107. *See id.*

108. *See* LEVINE, *supra* note 92, at 52.

109. *See* Salkin, *supra* note 96, at 118 (discussing the “smart growth” movement).

110. *Id.*

111. *Id.* Such measures include transfer of development rights, purchase of development rights that can preserve land, regional development strategies, measures that incentivize certain types of developments, local green infrastructure plans, and partnering with local conservancies to acquire and protect open lands. *See id.* at 118-19.

112. *See* CERVERO ET AL., *supra* note 63, at 186.

113. *See id.* at 186-88.

114. *Id.* at 188.

115. *Id.*

116. *See id.* at 229.

County, Virginia.¹¹⁷ The Rosslyn-Ballston corridor is a 2.5-mile stretch of high-density development along the Washington Metrorail Orange Line that serves thousands of residents and provides millions of square feet of office space.¹¹⁸ The zoning plan within the corridor controls density by limiting the floor area ratio of buildings depending on their proximity to metro stations.¹¹⁹ Similarly, “height limitations are imposed so that adjacent low-density neighborhoods are not overshadowed by high-rise buildings.”¹²⁰

TOD surrounding the D.C. Metro has produced many benefits.¹²¹ “Since 1990, [Arlington] County’s population has increased by 24.2 percent,” yet, “the population within a quarter-mile of the Rosslyn-Ballston Metro stations has increased nearly 107 percent.”¹²² The amount of “[o]ffice space in the Rosslyn-Ballston Corridor expanded from approximately 6 million square feet in 1970 to more than 23.5 million square feet by 2002. [There was] [a]n addition[al] 4.5 million square feet [added] ... between 2002 and 2009.”¹²³ Finally, as of 2000, 46 percent of workers in the Rosslyn-Ballston corridor reported either walking or taking public transportation to work.¹²⁴

Despite the success of TOD in certain cities, smart growth initiatives face obstacles in many areas of the country. One of the biggest problems, especially in auto-centric cities in the southern and western portions of the United States, comes from institutional and interest group resistance to public transportation use.¹²⁵ Entrenched land use and transportation policies that favor decentralized, low-density, and auto-centric growth patterns are not easy

117. See SUSAN WEAVER, LARGE COMMUNITY CASE STUDY: ROSSLYN-BALLSTON CORRIDOR, ARLINGTON, VIRGINIA 2 (2011), https://lii-production.s3.amazonaws.com/lii-data/download/579630267/download_Case_Study_Rosslyn-Ballston_Corridor.pdf [<https://perma.cc/H892-M2VQ>].

118. See *id.* at 2, 5.

119. See *id.* at 8.

120. *Id.* Design issues and step-backs are also required in order to protect the pedestrian landscape. See *id.*

121. See *id.* at 5-6.

122. *Id.* at 5.

123. *Id.* Job density around the Rosslyn station in 2005 was ninety-one jobs per acre. See *id.*

124. See *id.*

125. See, e.g., Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 276-81 (2000).

to overcome.¹²⁶ Bureaucratic and private actors, such as residential and commercial developers, automobile manufacturers, and government road contractors, have a vested interest in continuing current subsidies and regulations.¹²⁷

Another limiting factor is the lack of regional cooperation.¹²⁸ Scattered, low-density development patterns rarely respect political and municipal boundaries.¹²⁹ Although evidence of increasing cooperation exists, localities tend not to work harmoniously with one another.¹³⁰ Even if municipalities were to agree on larger growth strategies, “this would not eliminate the competition for new development among localities, particularly since most localities are dependent upon real estate taxes as a primary revenue source.”¹³¹

Further obstacles come from public perceptions of growth policies.¹³² People living in low-density areas may not be aware that TOD preserves open space, reduces traffic congestion, reduces air and water pollution, revitalizes communities, and increases quality of life.¹³³ Inaccurate perceptions may translate to political opposition to spending or development strategies that favor mass transportation use.¹³⁴

EAOL credits seek to separate the power to limit building densities in strategic transportation corridors from parties that have an interest in restraining such growth. Say, for example, that there is strong market demand for dense structures around transit centers in a municipality that zones for only low-density housing. Under traditional means of seeking a zoning variance or a change in zoning, the developer is unlikely to be successful in building larger, denser structures.¹³⁵ The legislature may be opposed to increasing zoning limits, given the lack of public support or interest group

126. *See id.* at 276.

127. *See id.* at 277.

128. *See id.* at 280-81.

129. *See id.* Traffic congestion and development patterns tend to be regional in nature, whereas zoning regulations and transportation initiatives are often local matters. *Id.*

130. *See id.* at 281.

131. *Id.*

132. *See id.* at 277-78.

133. *Id.* at 278.

134. *See id.*

135. *See infra* Part III.A (discussing TOD impediments under traditional means of recourse).

opposition.¹³⁶ EAOL credits, however, would allow the developer to petition independent zoning regulatory agencies for objective evaluations of building proposals.¹³⁷ If the agency finds that the building meets the evaluation criteria,¹³⁸ the agency can grant the property with EAOL credits. These credits advance TOD by allowing the developer to bypass opposing interests to build in excess of current zoning limitations when the property is linked to transit infrastructure.

In many instances, “land-use regulations are incapable of raising development densities or land-use mix to levels above that which the market desires.”¹³⁹ Commercially successful, compact “development that arises as a consequence of reforms in land-use policies constitutes prima facie evidence of the market’s interest in these [dense] alternatives.”¹⁴⁰ In circumstances in which the market demands, and can support, larger development than allowed under current land use policies, efforts should be taken to foster such growth. EAOL credits are not a means of compelling high-density development in instances in which no market demand exists. Rather, EAOL credits are designed to satiate organic market desire to build structures in strategic transportation corridors that produce viable economic returns under otherwise unfavorable zoning regulations.

III. INTRODUCTION TO EAOL ZONING CREDITS AS A METHOD OF ADVANCING TOD

A. TOD Hurdles Under Traditional Means of Recourse

Though TOD provides communities with numerous health, economic, and social benefits, in many areas of the United States, developers who wish to build structures in excess of current zoning regulations face daunting hurdles, from municipal opposition to interest group hostility.¹⁴¹ When market conditions warrant larger

136. *See infra* Part III.A.

137. *See infra* Part III.B.

138. *See infra* Part III.D (discussing the evaluation process for EAOL credit application).

139. LEVINE, *supra* note 92, at 109-10 (discussing market demand as a limit to TOD).

140. *Id.* at 110.

141. *See supra* Part II.B.

structures with higher capacity in proximity to transportation centers, developers are unlikely to succeed using traditional means of recourse, such as rezoning and variances.

The rezoning process tends to have a “chilling effect” on the developer’s behavior and proposal: “Most [local governments] charge a non-refundable fee for filing a rezoning request; these can range from less than one hundred up to several thousand dollars.”¹⁴² Many “[j]urisdictions also limit the time between rezoning applications covering the same piece of property.”¹⁴³ Consequently, developers are forced to wait a couple of years to file a subsequent request if their first request is not approved.¹⁴⁴

The planning commission also holds public hearings, which “encourage citizen participation ... [in] the initial, often emotional, debates over proposed rezoning.”¹⁴⁵ These procedures promote citizen opposition to development proposals, which makes it unlikely that elected officials will accept an application as proposed.¹⁴⁶

Developers also face challenges when seeking a zoning variance. State statutes often authorize local legislative bodies to grant permission—a variance—to a property owner to depart from zoning requirements.¹⁴⁷ Variances “are a form of administrative relief and are generally granted or denied by a ‘board of zoning appeals.’”¹⁴⁸ Variances are not viewed as measures “correcting improper zoning, a remedy for which is a change of zone through a legislative act.”¹⁴⁹ The administrative bodies that can grant variances do not have any power to rewrite the law or pass rules authorizing zoning enforcement officers to grant variances, but “can only recommend such modification to the local legislative body.”¹⁵⁰

142. Arnold Fleischmann & Carol A. Pierannunzi, *Citizens, Development Interests, and Local Land-Use Regulation*, 52 J. POL. 838, 842 (1990) (discussing how the rezoning process often reduces the size of projects or prevents them altogether).

143. *Id.*

144. *Id.*

145. *Id.* at 842-43.

146. *See id.* at 843.

147. *See* Osborne M. Reynolds, Jr., *Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One but Himself to Blame?*, 20 URB. LAW. 1, 1 (1988) (discussing the mechanisms of zoning variances).

148. *Id.* at 2.

149. *Id.* at 3.

150. *See id.* at 3-4.

Further, the standard for granting a variance depends upon a showing of "unnecessary hardship," as the New York Court of Appeals held in *Otto v. Steinhilber*.¹⁵¹ For a property owner to prove unnecessary hardship, he or she must demonstrate:

(1) [that] the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.¹⁵²

The stringent requirements of proving unnecessary hardship indicate that variances should not be leniently granted; however, statistics show courts are flexible in applying the standard.¹⁵³ That said, a developer who wants to construct a building in excess of what the current zoning allows, merely because the market warrants larger construction in a particular area, is unlikely to be awarded a variance under the unnecessary hardship standard if such variance relates to use.¹⁵⁴

B. EAOL Credits as a Solution

What is needed in such instances of TOD impediments is a means of recourse that will allow a developer to build larger buildings in proximity to transportation centers without going through burdensome, traditional methods of rezoning or seeking a variance. EAOL credits would permit developers to construct structures near transportation centers that current zoning regulations would otherwise not allow. EAOL credits would not result in a change in zoning ordinances or the zoning map. Rather, they would offer developers a special dispensation to build in excess of current zoning regulations because the nature of the property, due to its proximity to

151. 24 N.E.2d 851, 853 (N.Y. 1939).

152. *Id.*

153. See Reynolds, Jr., *supra* note 147, at 6.

154. See *id.* at 6-7 (discussing court inconsistency in applying the unnecessary hardship standard to use variances as opposed to area variances).

transportation infrastructure, warrants larger structures with greater capacity to aid in TOD.

EAOL credits should be granted only by legislatively appointed zoning regulatory agencies. Upon application by developers who wish to construct buildings that exceed current zoning limitations, the zoning regulatory agencies would determine, on a case-by-case basis, whether to grant the developer EAOL credits using a three-part test. First, the development site would have to be within close proximity to a transit center. Second, the development would need to include proposals for public improvements. Third, the developer would have to show a reasonable rate of return from the proposed development. This Note will now examine, in further detail, the creation of the zoning regulatory agencies and the factors that the agencies would use to determine whether a certain property is eligible to receive EAOL credits.

C. Legislatively Created Zoning Regulatory Agencies as the Medium Through Which EAOL Credits Are Granted

The Federal Administrative Procedure Act defines the term “agency,” specifically defining the courts and legislatures as non-agencies.¹⁵⁵ Contemporary administrative agencies are vested with the power to prescribe the kind of action to take, if any, in situations identified by statute.¹⁵⁶ “Agencies vested with these powers are usually called ‘regulatory agencies’ because their activities impinge upon private rights and regulate the manner in which those rights may be exercised.”¹⁵⁷

Whereas legislatures are created by their respective constitutions, administrative agencies are created by their respective legislatures.¹⁵⁸ “The agency may possess the power to lay down prescriptions that have the force of law,” but may do so only upon “delegation from the legislature.”¹⁵⁹ “Any power delegated by the

155. See Administrative Procedure Act, 5 U.S.C. § 551(1) (2012).

156. See BERNARD SCHWARTZ, ADMINISTRATIVE LAW 5 (3d ed. 1991) (discussing different kinds of government agencies).

157. *Id.*

158. *Id.* at 10 (discussing the differences between agencies, legislatures, and the courts).

159. *Id.*

legislature is necessarily a subordinate power, limited by the terms of the delegating statute.”¹⁶⁰

In order “[t]o preserve the position of Congress as the primary legislator, delegations of power may not be inordinate.”¹⁶¹ The limits of the power that Congress intended “must be determined in the statute.”¹⁶² This idea is known as the “intelligible principle.”¹⁶³ The statute must define limits upon the agency’s authority and provide an intelligible principle to guide the exercise of the delegated discretion.¹⁶⁴ The delegation “doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.”¹⁶⁵

Compared to federal judges, “[m]any state judges adopt a stricter attitude toward delegation than do their federal confreres.”¹⁶⁶ Whereas most federal courts operate with a view of deference to agencies, “[t]he prevailing attitude in many state courts has been one of distrust toward the administrator.”¹⁶⁷ As Bernard Schwartz states: “State judges may be less willing to allow administrators ... to exercise powers unrestrained by standards [defined] in delegating statutes.”¹⁶⁸ Accordingly, as state legislatures will be the primary actors creating the zoning regulatory agencies discussed in this Note, the logistics of the agencies and their authority must be prescribed with precision.

To accommodate state judges’ strict view regarding the delegation of power, the delegating statute for EAOL credits should define the zoning regulatory agencies in a manner resembling the way the Board of Adjustment is defined in the U.S. Department of Commerce’s Standard State Zoning Enabling Act.¹⁶⁹

Statutory language should provide that the zoning agency consist of five members, to be appointed by the legislature for a term of

160. *Id.*

161. *Id.* at 45 (discussing the standards guiding the delegation of power).

162. *Id.*

163. *Id.* at 56.

164. *See id.* at 45-46.

165. *Id.* (discussing the benefits of defined delegation statutes).

166. *Id.* at 64.

167. *Id.* at 64-65 (discussing the difference between federal and state attitudes towards delegating power to agencies).

168. *Id.* at 65.

169. *See* STANDARD ZONING ACT, *supra* note 97, § 7.

three years.¹⁷⁰ The members should be individuals who possess substantial knowledge or experience in development or land use policies. The legislature, upon written charges and a public hearing, would be permitted to remove the members of the agency for cause.¹⁷¹

The agency would meet no later than one week after an individual submitted an application to receive EAOL credits for a development site. The member-appointed chairman would call the meeting to order. All agency meetings would be open to the public, and the agency would keep minutes of each meeting in which it analyzed a development application.¹⁷² The agency would keep record of voting, if any, regarding the decision to grant the development site with EAOL credits.¹⁷³ The decision of whether to grant the credits for the development site would be made within a reasonable time after the developer submitted the application to the agency.

The zoning regulatory agency would have the authority to:

- (1) hear and decide whether a development site shall be authorized as an exception to current zoning regulations without needing to seek a formal zoning variance or petition the legislature for a zoning change;
- (2) grant a development site with EAOL credits; and
- (3) authorize an exception to current zoning regulations upon analysis of
 - (a) the site's proximity to transit centers,
 - (b) community improvements provided by the development, and
 - (c) the development's reasonable rate of return.

In exercising said power, three out of five votes would need to be cast in favor of granting EAOL credits to the development site for said credits to apply to the property. The decision the agency reaches should be a careful one, made after due scrutiny. The agency could: vote to grant the property with EAOL credits; vote to deny the proposal wholly; or vote to deny the proposal with recommendations for changes that, if implemented, would allow the developer to

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.*

submit an amended proposal to his or her original application for further consideration.

If the agency voted in favor of granting EAOL credits, the developer would have the right to develop the property in accordance with the approved design after the agency records its approval. An aggrieved party could seek judicial review of the agency's decision.¹⁷⁴ The courts, however, should give deference to the knowledge and expertise of the agency in reaching its decision.

If the zoning regulatory agency did not confer the development site with the EAOL credits, the developer would be left to resort to traditional variance requests or the rezoning processes. As demonstrated, both means are difficult and unlikely to provide the developer with his or her desired remedy.¹⁷⁵ EAOL credits are designed to provide developers the opportunity to cultivate lots in proximity to transit centers based on market demand in the absence of an otherwise compelling reason that would warrant the issuance of a variance.

D. Introduction to the Three-Part Test to Evaluate EAOL Credit Eligibility

When market conditions warrant the construction of larger structures near transit centers than allowed under current zoning regulations, a developer could petition the zoning regulatory agency to acquire EAOL credits for their proposed development. Upon application, the agency would exercise discretion to designate a development site with EAOL credits upon analysis of three required factors. First, the site would need to be in close proximity to transit centers. Second, the development would have to provide improvements to the community. Finally, the development would have to provide a reasonable rate of return.

1. Part One: Proximity to Transit Centers

The first factor that the zoning regulatory agency would consider is the property's proximity to transit centers. As the purpose of

174. See *infra* Part III.E.

175. See *supra* Part III.A.

EAOL credits is to encourage efficient TOD, the development site would need to be in close proximity to a transit station to receive EAOL credits.

Modern transportation agencies, such as the Metropolitan Atlanta Rapid Transit Authority, define a “transit [center]” as “[a] facility where transit passengers board transit vehicles and alight from them, including, to the degree applicable, the areas where passengers purchase tickets, acquire information about the transit service, and wait to board their vehicles. Transit [centers] include facilities for rail, bus, and streetcar services of all types.”¹⁷⁶ The delegating statute creating the zoning regulatory agency should codify a similar definition.

The legislature should provide, in the statute, a list of examples of transit centers according to the language of the definition. Transit centers would include, but would not be limited to: commuter train stations, subway stations, elevated rail stations, ferry terminals, bus stations, light rail stations, and trolley stations.

The zoning regulatory agency would determine, on a case-by-case basis, the proximity that each property must be in relation to said transit centers to qualify for EAOL credits. Many modern municipalities accept one-half mile as the traditional distance for gauging a transit center’s catchment.¹⁷⁷ The one-half mile radius has also become the de facto standard for TOD planning and zoning regulations.¹⁷⁸ Often, transportation-zoning overlays follow the one-half mile radius as the accepted distance at which the transit center will positively benefit development.¹⁷⁹

The zoning regulatory agencies, however, should not follow the one-half mile radius standard. For a development site to qualify for EAOL credits, the property would, in most cases, have to be no more than several blocks from a transit center. The reason for the strict proximity is that, unlike typical blanket zoning around transit cen-

176. METRO. ATLANTA RAPID TRANSIT AUTH., *TRANSIT-ORIENTED DEVELOPMENT GUIDELINES* 104 (2010), <http://www.reconnectingamerica.org/assets/Uploads/MARTATODGuidelines11-2010-Final.pdf> [<https://perma.cc/WL5E-AK5L>] (the Metropolitan Atlanta Rapid Transit Authority uses the term “transit station”).

177. Erick Guerra et al., *The Half-Mile Circle: Does It Best Represent Transit Station Catchments?* 1 (Univ. of Cal. Berkeley Inst. of Transp. Studies, Working Paper No. UCB-ITS-WWP-2011-5, 2011).

178. *See id.*

179. *See id.*

ters, EAOL credits are not intended to provide for large swaths of zoning exceptions. EAOL credits are designed to provide for larger developments than otherwise permitted, even within transportation-zoning overlays, when market forces warrant their construction due to the property's direct and inextricable link to transit centers. The EAOL credits should reflect the legislature's acknowledgment that property around transit centers benefits from, and should take advantage of, the impact of transit centers.¹⁸⁰ EAOL credits reflect the philosophy that, in certain instances, the health, social, and economic benefits provided by transportation infrastructure, and the public policy desire to encourage mass transportation use, are so substantial that they warrant divergence from zoning that would otherwise hinder such benefits.

2. Part Two: Required Area Improvements

The second factor that the zoning regulatory agency would consider when evaluating EAOL credit applications is whether the development would provide the local community with public improvements. For a property to acquire EAOL credits, the development would need to include provisions that would improve the quality of life for pedestrians and citizens in the vicinity.

The statutory language should require that the proposal include an element that provides the local community and its citizenry with aesthetic, economic, transportation, health, educational, recreational, public use, or public safety benefits that would be open and accessible to individuals beyond those with access to the completed building. In other words, the benefits that the development provides would also need to be available to those who do not live or work in the proposed development. The agency should use its development and planning expertise to evaluate the individual aspects of each development to determine if the project would provide the community with public benefits.

Municipalities subscribe to a broad definition of factors that qualify as public improvements.¹⁸¹ The legislature should provide, in the

180. See *supra* Part I.B.2.

181. See, e.g., CHRIS SCHILDT, GREENBELT ALL., PUBLIC BENEFIT BONUS POLICY BRIEF 5 (2012), <http://www.greenbelt.org/wp-content/uploads/2013/06/public-benefits-bonus-policy-brief.pdf> [<https://perma.cc/7MLG-YK8H>].

delegating statute, examples of public benefits used by other jurisdictions that the agency should consider when evaluating individual EAOL applications. Examples would include, but would not be limited to: parks; recreation facilities; open space; affordable housing; street and transportation improvements; art and community facilities; educational facilities; funding for local schools; hospitals; environmentally friendly developments; and economic opportunities for local citizens.¹⁸²

The zoning regulatory agency would assign significant weight to EAOL credit applications that propose improvements to adjacent transit centers. Because the property and the development would benefit from proximity to transit centers, proposals to provide improvements to those transit centers would be viewed favorably by the regulatory agency. Examples of improvements to the transit centers would include, but would not be limited to: increased or upgraded station access points; new or upgraded access to stations for those with disabilities; user information upgrades, such as electronic scheduling and up-to-the-minute arrival and departure information; station safety improvements; increased station sanitation and aesthetics; heating and air conditioning of stations; food or retail establishments within the stations; and better station integration within the street and community atmosphere.¹⁸³

3. Part Three: Reasonable Rate of Return

The third factor that the zoning regulatory agency would analyze when considering EAOL credit applications is whether the proposed development would provide a reasonable rate of return.

Under traditional means of seeking a variance, a reasonable rate of return requires that “an applicant ... prove that they cannot realize a reasonable return for each and every permissible use of the land. Therefore, the applicant must establish that all the uses of the land under the applicable zoning ordinances will not allow the applicant to realize a reasonable return.”¹⁸⁴

182. *See id.* at 2.

183. *See Transit Station Improvements*, VICTORIA TRANSP. POLICY INST., <http://www.vtpi.org/tdm/tdm127.htm> [<https://perma.cc/CMZ6-58A4>] (last updated Apr. 17, 2015).

184. 2 PATRICIA E. SALKIN, *NEW YORK ZONING LAW AND PRACTICE* § 29:7 (4th ed. 2008) (footnotes omitted).

However, EAOL credits should not require such a strict finding. Rather than showing that he or she could not receive a reasonable rate of return under permissible uses, the developer would need to show that the city or neighborhood would receive a net benefit from his or her development in excess of the benefit that could have been received from a building constructed under the current zoning guidelines. The agency would have discretion to determine whether the proposed development would provide a net benefit that constitutes a reasonable rate of return. The statute should provide a list of factors the agency should consider, including, but not limited to, whether the EAOL development would: provide greater tax revenue, increase the number of jobs in the city, attract new businesses to the area, and be free of public health and safety hazards.

E. Judicial Review

The court holds a vital role in judicial review of agency conclusions of law, findings of fact, and decision-making procedures.¹⁸⁵ The first role of the courts is to limit agency decisions within boundaries established by the delegating statute.¹⁸⁶ Modeled after the method established in the Standard State Zoning Enabling Act, an aggrieved party, including a developer who was denied EAOL credits, would be able to seek judicial review of the zoning regulatory agency's decision by a court of record.¹⁸⁷ For the purposes of definition, an aggrieved person constitutes "[a]ny person or persons, jointly or severally, aggrieved by any decision of the [agency] ... or any taxpayer, or any officer, department, board, or bureau of the municipality."¹⁸⁸ Such a petition would need to be filed within thirty days of the filing of the regulatory review agency's decision.¹⁸⁹

Upon review by the courts, the decision to overturn the zoning regulatory agency's assessment should not be made lightly: "Courts describe their role in reviewing agency findings, conclusions, and

185. See RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 115 (6th ed. 2014) (discussing the role of courts in judicial review of agency decisions).

186. See *id.*

187. See STANDARD ZONING ACT, *supra* note 97, § 7.

188. *Id.*

189. See *id.*

procedures as limited.”¹⁹⁰ Legislatures frequently intend “to allow agencies a measure of discretion to interpret statutory provisions, resolve factual controversies, and select procedures.”¹⁹¹ Further, “reviewing courts tend to defer to agencies because agencies often have superior knowledge of the wide range of factors that should be considered in making decisions.”¹⁹² As the Maryland Supreme Court held in *Oursler v. Board of Zoning Appeals of Baltimore County*, “[t]he function of a zoning board is to exercise the discretion of experts, and the court on appeal will not disturb the board’s finding where it has complied with the legal requirements of notice and hearing, and the record shows substantial evidence to sustain the finding.”¹⁹³ Accordingly, the court should give deference to the decision and expertise of the agency and uphold the decision unless there is a clear showing of egregious error, bad faith, or some other exigent circumstance.¹⁹⁴

If the court were to find cause to depart from the zoning regulatory agency’s decision, the court could order the agency to review the decision and return thereto in no less than ten days.¹⁹⁵ A court reviewing agency decisions “may take additional evidence or testimony if necessary, but since the [agency] is presumably better acquainted with the locality, remanding such cases for further findings seems a more desirable practice.”¹⁹⁶ The agency’s return should set forth a new decision or produce additional factors that support a showing of the initial decision.¹⁹⁷ The court could then ultimately reverse, affirm, wholly or in part, or modify the new decision of the agency.¹⁹⁸

The second role that courts play in judicial review is “to confine agency actions within boundaries established by the Constitu-

190. PIERCE ET AL., *supra* note 185, at 118 (discussing judicial deference toward agency decisions).

191. *Id.*

192. *Id.*

193. 104 A.2d 568, 572 (Md. 1954).

194. See 5 U.S.C. § 706(2)(A) (2012) (granting judicial power to set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

195. See STANDARD ZONING ACT, *supra* note 97, § 7.

196. Note, *Zoning Variances*, 74 HARV. L. REV. 1396, 1401 (1961) (footnote omitted) (discussing judicial review procedures for agencies).

197. See *id.*

198. See STANDARD ZONING ACT, *supra* note 97, § 7.

tion.”¹⁹⁹ The court “has the power to hold not only that a particular agency action lies impermissibly beyond constitutional boundaries, but also that Congress acted unconstitutionally in purporting to grant an agency the power to take some types of actions.”²⁰⁰ If a court finds “that Congress has authorized an agency to engage in unconstitutional actions, a court will hold the statute authorizing such actions unconstitutional.”²⁰¹ If the agency’s action merely raises a constitutional issue, “a court will strain to interpret the relevant statutory provisions in a manner that does not permit the agency to take the constitutionally questionable actions.”²⁰² No such federal constitutional issues would likely appear in the case of EAOL credits due to the intelligible principle developed through the strict language in the delegating statute. Any issues that arise would have to be resolved on a case-by-case basis in light of the relevant state statutes and constitutions.

IV. POTENTIAL OBSTACLES TO OVERCOME

Although the benefits of TOD have been explored at great length,²⁰³ there are challenges facing the further expansion of TOD in many areas of the United States.²⁰⁴ Opponents to TOD raise issues such as lack of funding, rental and leasing price increases, and limited public support as counterarguments against expansion of TOD.²⁰⁵ As a tool of TOD, EAOL credits also face challenges in regard to many of the following obstacles. However, EAOL credits would provide opportunities to solve many of the hurdles facing TOD growth in the future.

One such obstacle is the increase in price and rent of buildings in areas in proximity to transit centers.²⁰⁶ As TOD increases, the

199. PIERCE ET AL., *supra* note 185, at 115.

200. *Id.*

201. *Id.* at 116.

202. *Id.*

203. *See supra* Part I.B.

204. *See* CERVERO ET AL., *supra* note 63, at 99; *supra* Part II.B.

205. *See, e.g.*, JOHN LUCIANO RENNE, PLANNING & TRANSP. RESEARCH CTR., TRANSIT-ORIENTED DEVELOPMENT IN WESTERN AUSTRALIA: ATTITUDES, OBSTACLES AND OPPORTUNITIES 30-31 (2005), http://www.patrec.uwa.edu.au/_data/assets/pdf_file/0005/2577848/2005-TRANSIT-ORIENTED-DEVELOPMENT-IN-WA-ATTITUDES-OBSTACLES-AND-OPPORTUNITIES-John-Luciano-Renne.pdf [<https://perma.cc/MA6Q-8FUX>].

206. *See id.* at 30.

number of people living near transit centers, and the subsequent increase in demand, can drive up prices of buildings and rents.²⁰⁷ If supply of housing or commercial space is low, the cost of moving to TOD zones can be prohibitive to many residents and businesses.²⁰⁸ EAOL credits, however, offer an opportunity to help control the rise in prices by increasing the amount of available space in areas around transit centers. If cities and communities implement EAOL credits to allow for larger buildings, developers may be able to increase the supply of apartments, condominiums, office space, and retail space. This increase in supply may help to alleviate the price inflation caused by stagnant growth under restrictive zoning regulations.

Another obstacle that TOD faces is financing.²⁰⁹ Finding funds to pay for TOD planning and implementation is typically difficult in the public sector.²¹⁰ There is often a lack of available financing that allows cities, municipalities, or transportation agencies to expand infrastructure, construct new stations, or improve existing stations.²¹¹ EAOL credits offer an opportunity to help with financing concerns as well. As developers must propose public improvements in order to receive EAOL credits, zoning regulatory agencies would pay particular attention to developers who propose improvements to transportation infrastructure. EAOL credits, therefore, could offset significant portions of the costs from local governments and transit agencies by distributing portions of the cost to developers. The developers, in an attempt to build larger structures and as part of the public benefit requirement, could offer to upgrade existing transit centers or otherwise contribute to improving transportation infrastructure.

Further, EAOL credits could increase the number of businesses and residents in a city or community. This increase offers the potential to expand the tax base available to city and municipal governments.²¹² When there are more residents and businesses, the

207. *See id.* (discussing pricing obstacles to TOD).

208. *See id.*

209. *See id.*

210. *See* CERVERO ET AL., *supra* note 63, at 445.

211. *See id.*

212. *See id.* at 332-33.

local government has more revenue flowing into its coffers.²¹³ This gives the local government the opportunity to expand funding to transportation development and infrastructure.²¹⁴

One additional obstacle facing TOD development, and arguably the most difficult, comes from conflicting political agendas and priorities that often stem from public support and perception.²¹⁵ Although most urban planners understand the concept and benefits of TOD, the public largely does not have the same degree of understanding or support.²¹⁶ Because of the differences in opinion among the public, there are various political agendas, motivations, and opposing interests in government.²¹⁷ The differences among these stakeholders make it difficult for members of government, on the national and local levels, to come to a unified consensus for devoting funding to upgrade and expand transportation infrastructure.²¹⁸

EAOL development could offer a solution to public and government support for TOD by allowing developers to bypass restrictive zoning that inhibits TOD. Further, as previously mentioned, EAOL credits could alleviate the necessity to rely wholly on government funds by allowing developers the opportunity to fulfill the public improvement requirement of receiving EAOL credits by upgrading or expanding transportation infrastructure.

In order to foster more harmonious relationships between conflicting interests and to improve public perception of TOD, it is vital that public outreach and education become a priority among developers and local governments.²¹⁹ By expanding dialogue to the public sphere and promoting the benefits and goals of TOD, developers, transportation agencies, and government officials can attempt to mediate disputes and reach some degree of consensus about devoting resources toward TOD.²²⁰ EAOL credits, in an effort to expand TOD, would help to expose larger numbers of people and business to the benefits of development oriented around transit. As the process is embraced by more businesses and citizens, the in-

213. *See id.*

214. *See id.*

215. *See id.* at 99, 102.

216. RENNE, *supra* note 205, at 30.

217. *See* CERVERO ET AL., *supra* note 63, at 447.

218. *See id.* at 448.

219. *See id.* at 447.

220. *See id.*

crease in public knowledge and support can facilitate future government encouragement and support for TOD in the United States.

CONCLUSION

Transportation-Oriented Development is a planning strategy that aims to incentivize and orient commercial and residential developments around transit centers. Although TOD generates substantial social, economic, and health benefits, zoning regulations in the United States largely favor and encourage low-density, auto-centric sprawl.

In an effort to promote TOD when faced with zoning hurdles, this Note proposes legislatively created zoning regulatory agencies that would have the authority to confer a property with “earned-as-of-location” credits. EAOL credits would permit a developer to construct buildings in excess of height and floor area ratios otherwise prohibited under current zoning regulations.

When market demand warrants the construction of larger residential and commercial structures, developers could submit an application to the zoning regulatory agencies to receive EAOL credits for the respective property. The zoning regulatory agency would evaluate, on a case-by-case basis, three factors to determine whether to confer EAOL credits upon the development site. First, the property would need to be in close proximity to transit centers. Second, the development would have to include proposals for public improvements. Finally, the development would need to produce a reasonable rate of return for the city beyond what could already be realized under current zoning laws.

EAOL credits reflect the philosophy that, in order to maximize the benefits offered by transportation infrastructure, certain developments warrant construction of larger buildings than otherwise permitted under restrictive zoning regulations.

TOD currently faces obstacles that threaten future expansion, such as lack of public support, limited sources of funding, and conflicting governmental interests. As the population of the United States continues to grow and favor urban areas, however, EAOL credits offer the opportunity to reduce some of the challenges facing efficient transportation planning in the future. EAOL credits, when effectively utilized, would provide the potential to promote safe

neighborhoods, encourage healthier lifestyles, and increase economic activity in strategic transportation corridors by embracing transportation infrastructure and reducing automobile dependent transportation in the United States.

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